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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-5195

MICHAEL JONES,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

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The petitioner, Michael Jones, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the District of Columbia Court of Appeals entered in the proceeding on May 29, 1981.

QUESTIONS PRESENTED

1. Whether a criminal defendant found not guilty by reason of insanity of attempted petit larceny -- a misdemeanor -- can, consistent with due process, be confined indefinitely to a mental hospital on the basis of that finding alone.

2. Whether it is denial of equal protection to confine in a mental hospial a defendant found not guilty by reason of insanity for a period longer than he could have been incarcerated upon conviction of the offense, without affording him the procedural protections afforded civil committees.

OPINION BELOW

The two panel opinions of the District of Columbia Court of Appeals are reported at 396 A.2d 183 (1978) and 411 A.2d 624 (1980). The en banc opinion is reported in slip opinion No. 11918 (D.C. Ct. App. May 29, 1981). The three opinions are reproduced infra, at appendices A, B, and C respectively.

JURISDICTION

The en banc judgment of the Court of Appeals was entered on May 29, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

STATUTE INVOLVED

24 D.C. Code § 301(d) and 21 D.C. Code § 545(b). These sections are reproducted at footnotes 1 and 2 of the en banc opinion of the court below.

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinion Below	ii
Jurisdiction	ii
Constitutional Provisions Involved	ii
Statute Involved	ii
Statement of the Case	1
Reasons for Granting the Writ	5
Argument	6
Conclusion	13
Appendix	14

TABLE OF AUTHORITIES

Cases:	Page
Addington v. Texas, 441 U.S. 418 (1979)	2,7,8,11
Baxstrom v. Herold, 383 U.S. 107 (1966)	3,4,9,10,11,12
Bolton v. Harris, 130 U.S. App. D.C. 1, 395 F.2d 692 (1968)	3
Humphrey v. Cady, 405 U.S. 504 (1972)	3
In re Hodge, D.C. App. 325 A.2d 605 (1974)	2
In re Nelson, D.C. App. 408 A.2d 1233 (1979)	2
Jackson v. Indiana, 406 U.S. 715 (1972)	3
McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972)	3
Specht v. Patterson, 386 U.S. 605 (1967)	3

TABLE OF AUTHORITIES (CONT'D)

Cases:	Page
United States v. Brown, 155 U.S. App. D.C. 402, 478 F.2d 606 (1973)	3,9
Waite v. Jacobs, 154 U.S. App. D.C. 281, 475 F.2d 392 (1973)	3,9,11

DISTRICT OF COLUMBIA CODE

21 D.C. Code § 545	2,3,7,11
24 D.C. Code § 301	11
24 D.C. Code § 301(d)	6,11,12
24 D.C. Code § 301(d)(1)	1,8
24 D.C. Code § 301(d)(2)	1,2
24 D.C. Code § 301(d)(2)(B)	8
24 D.C.Code § 301(j)	7
24 D.C. Code § 301(k)	8

STATEMENT OF THE CASE

Petitioner, Michael Jones, was arrested on September 19, 1975 and charged with attempted petit larceny for trying to steal a coat from a department store. On September 22, 1975, following his arraignment on a misdemeanor information, he was ordered to Saint Elizabeths Hospital for a mental examination. After a three and half month delay, during which Mr. Jones was jailed pending bed space at the hospital, he was transferred to St. Elizabeths, where he remained for about one month. On March 12, 1976, Mr. Jones was brought back to court. The examining physician testified that Mr. Jones was competent for trial, but that, on the date of the alleged offense, he was suffering from a mental disease which substantially impaired his behavior controls, and that the alleged offense, if committed by him, was the product of his mental disease. In an uncontested non-jury proceeding, the trial court then found Mr. Jones not guilty of attempted petit larceny by reason of insanity. Mr. Jones was then recommitted to Saint Elizabeth Hospital pursuant to 24 D.C. Code § 301(d)(1).

On May 25, 1976, after a series of continuances, Mr. Jones appeared before the Superior Court of the District of Columbia for a hearing pursuant to 24 D.C. Code § 301(d)(2). After hearing testimony of a St. Elizabeths psychologist the court found that Mr. Jones had failed to establish that he was neither dangerous to himself or others, and, based on that finding, ordered Mr. Jones committed to the Hospital for an indeterminate period.

After several delays and filings on behalf of both parties, the case again came on for a hearing on February 22, 1977, this time before another judge of Superior Court. Counsel for Mr. Jones argued that Mr. Jones had already been confined many months longer than the maximum sentence he could have received

had he been convicted of the attempted larceny charge, and that his commitment pursuant to 24 D.C. Code § 301(d)(2) therefore had to be vacated. The court denied Mr. Jones' motion, and without receiving any medical testimony or any other evidence of Mr. Jones' condition at that time, affirmed the May 25, 1976 order of commitment.

On appeal to the District of Columbia Court of Appeals the petitioner argued that his confinement was unconstitutional. Petitioner contended that when he was initially committed, following his insanity acquittal, he had not been afforded the procedural protections guaranteed to putative civil committees under 21 D.C. Code 545; that is, he argued that he was committed without the government proving by the requisite standard of proof -- at that time in the District that standard was proof beyond a reasonable doubt 1/ -- the requisite elements of committability -- then, and now, dangerousness to self or others due to a mental illness. Instead, his initial commitment was premised solely on his acquittal by reason of insanity of the charge of attempted petit larceny. This acquittal, petitioner argued, did not establish present mental illness or dangerousness at all, and established only past mental illness by a preponderance of the evidence. Petitioner argued that if this lower leven of proof could be

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1/ The District of Columbia Court of Appeals had ruled that civil commitment required the government to establish mental illness and dnagerousness by proof beyond a reasonable doubt. In re Hodge, D.C. App., 325 A.2d 605 (1974). After this Court's decision in Addington v. Texas, 441 U.S. 418 (1979), the court of appeals adopted the minimum constitutional standard of proof by clear and convincing evidence. In re Nelson, D.C. App., 408 A.2d 1233 (1979).

justified at all, it was only on the basis that he had been proved to have committed the acts constituting petit larceny, while a civil committee has not necessarily been proved to have committed a criminal act. But, petitioner maintained, even if the initial disparity could be justified on this basis, the justification evaporated once he had been confined for the one year for which he could have been incarcerated upon conviction; and so, after that one year, the government had to prove his committability under the civil commitment statute, 21 D.C. Code 545, or release him.

For his argument petitioner relied on a series of decisions of this Court, particularly Baxstrom v. Herold, 383 U.S. 107 (1966); Specht v. Patterson, 386 U.S. 605 (1967); Humphrey v. Cady, 405 U.S. 504 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); and McNeil v. Director, Patuxent Institution, 407 U.S. 245; and on a series of decisions of the United States Court of Appeals for the District of Columbia Circuit, particularly, Bolton v. Harris, 130 U.S. App. D.C. 1, 395 F.2d 692; Waite v. Jacobs, 154 U.S. App. D.C. 281, 475 F.2d 392; and United States v. Brown, 155 U.S. App. D.C. 402, 478 F.2d 606. These cases, petitioner argued, stood generally for the proposition that a criminal charge, whether pending (e.g., Jackson v. Indiana), culminating in a conviction (e.g., Baxstrom v. Herold; Cady v. Humphey); or culminating in an insanity acquital (e.g., Bolton v. Harris; United States v. Brown) cannot justify a commitment beyond that authorized as the penalty for the crime itself unless the defendant is afforded the procedural protections guaranteed to putative civil committees.2/

2/ In Jackson, because the defendant had not been found even to have committed a criminal act, he could not be confined, except for examination, on the basis of the criminal charge.

The Court of Appeals panel initially found for the government. The panel majority ruled that by failing to challenge his initial commitment, petitioner had thereby conceded that it was "not based, even in part, on punitive considerations." Thus, the court reasoned, petitioner had conceded that his commitment was purely therapeutic; and, as such, its duration could bear no rational relationship to the prison term that could have been imposed upon conviction. The panel strongly hinted that an attack on the constitutionality of petitioner's initial commitment might well succeed on the theory that it was punitive and thus invalid under Baxstrom v. Herold, supra.

Petitioner sought rehearing, arguing that by attacking his continued confinement he was implicitly attacking his initial commitment as well -- if that commitment was construed as an indeterminate one. That is, petitioner's argument was that an indeterminate commitment based solely on his insanity acquittal of petit larceny was unconstitutional, and that even if the commitment was valid if construed as lasting only for the period he could have been incarcerated upon conviction -- here, one year -- that period had long since passed, and so, however the commitment was construed, it was now an unconstitutional basis on which to continue to confine him.

The panel granted rehearing, and reversed itself. The panel majority concluded that the petitioner's commitment was based in part on a punitive purpose, and because it was also premised on a lesser showing than that required for an indeterminate civil commitment, it could not persist beyond the maximum one year penal term which is authorized for attempted petit larceny. Thus the panel ordered the government either to seek petitioner's civil commitment, or to release him.

It was now the government's turn to file a petition for rehearing, which the court granted, and, upon rehearing en banc, the court reversed the panel's second decision and upheld the petitioner's continued confinement under his initial commitment. The majority concluded that petitioner's commitment was non-punitive, and that the diminished procedural safeguards accorded the petitioner could be rationally justified by the situational difference between those whom the state seeks to commit civilly and those whom it commits on the basis of a finding of not guilty by reason of insanity. The majority then distinguished in a rather wooden, and unconvincing manner, the cases on which petitioner had relied.

Three judges dissented, and agreed with the petitioner's argument that his continued confinement was unconstitutional.

REASONS FOR GRANTING THE WRIT

This case raises a fundamental constitutional issue that has never been directly resolved by this Court; namely, whether a defendant found not guilty by reason of insanity of a non-violent misdemeanor can be committed to a mental hospital on the basis of that finding alone, and, if he can be, whether the commitment based on that finding can be an indeterminate one that persists for longer than the period for which the defendant could have been incarcerated had he been convicted rather than acquitted. While this issue has not been definitively resolved, in petitioner's view the decision of the court below upholding such an indeterminate commitment, clearly conflicts with a series of decisions by this Court, which demonstrate that the petitioner's continued confinement denies him his constitutional rights to due process

and to equal protection. Moreover, the decision below directly conflicts with decisions which are controlling in the United States Court of Appeals for the District of Columbia Circuit, which court is charged with enforcing the very same commitment statute at issue here. Consequently if this conflict is not resolved, insanity acquittees in the federal courts of the District of Columbia will be treated differently from acquittees in the local courts, even though all are subject to commitment to the same hospital under the same statute. Finally, the constitutional question at issue here is one that will recur frequently until it is resolved by this Court, and it has already been recently faced by several state courts.

ARGUMENT

On September 19, 1975, Michael Jones was arrested for trying to steal a coat from a department store. Had the government proved Mr. Jones guilty of this offense, he could have been imprisoned for at most one year. But Mr. Jones was not found guilty. He was acquitted because the fact finder was convinced by a preponderance of the evidence that at the time of the offense Mr. Jones was mentally ill and not criminally responsible for his acts. As a result of this finding that he was not blameworthy, Mr. Jones has now been confined against his will not for one year, but so far, for almost six years. And he faces the prospect of being so confined for the rest of his life. Yet at no time has the government proved the need for that confinement. For under 24 D.C. Code 301(d), a person found not guilty by reason of insanity, of any crime whatever, is automatically committed to a mental hospital until he can prove that he is neither mentally ill nor dangerous.

In petitioner's view this automatic, indeterminate commitment is unconstitutional as applied to him for two reasons. First, the petitioner's initial commitment was invalid because he was never proven to be committable by clear and convincing evidence, as Addington v. Texas, 441 U.S. 418 (1979) requires that he be. Second, even if his initial commitment was valid, his continued confinement beyond the one year that he could have served upon conviction of petit larceny constitutes a denial of equal protection of the laws; for he is being confined longer than those defendants actually convicted of attempted petit larceny on the theory that he is not being punished but "civilly" committed; yet at the same time he has not been afforded the procedural protections to which a civil committee is constitutionally and statutorally entitled.

(1) To obtain a civil commitment order in the District of Columbia, the government must prove that the putative committee is mentally ill and, as a result, dangerous to himself or others. 21 D.C. Code 545. This Court made clear in Addington v. Texas, supra, that due process requires that committability be proved by clear and convincing evidence before a person can be confined indefinitely to a mental hospital. Here, all that the government proved with respect to Michael Jones was that at the time he committed the acts constituting attempted petit larceny he was mentally ill -- and even this was proved only by a preponderance of the evidence. 3/ His dangerousness was never proved by the government at all, by any standard. The Court of Appeals effectively ruled that proof of the commission of any criminal

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3/ The 1970 amendments to 24 D.C. Code 301(j) place the burden on the defendant to prove insanity by a preponderance of the evidence. Thus it is true that the finding of not guilty by reason of insanity does constitute an affirmative finding of past mental illness.

act beyond a reasonable doubt, coupled with a finding by a preponderance of the evidence that it was committed as the result of a mental illness, can substitute for the level of proof which Addington requires, of present committability by clear and convincing evidence. 4/ This is simply irrational. Not all criminal acts demonstrate the sort of dangerousness which can justify an indeterminate confinement to a mental hospital under the District of Columbia's civil commitment statute. And, appellant submits, an attempted petit larceny clearly does not by itself, establish the requisite dangerousness for such a commitment. Yet petitioner's indeterminate commitment is premised solely on the fact that he tried to steal a coat because he was mentally ill. And even his mental illness was not proved by the standard required in Addington, for all the uncontested insanity defense established was that at the time the appellant tried to steal the coat he probably was suffering from a mental illness. His present mental illness was not proved at all, and even his past mental illness was not proved by clear and convincing evidence. Thus neither the dangerousness facet nor the mental illness facet of committability was proved by the standard required under Addington, and so the petitioner's commitment denied him due process of law.

4/ Although 24 D.C. Code 301(d)(1) does not set out any criteria of committability, i.e., commitment is automatic whenever the defendant successfully raises an insanity defense in any criminal prosecution, it is clear that it presupposes a commitment based on mental illness and dangerousness. For to gain release under 24 D.C. Code 301(d)(2)(B) or 301(k), the acquittee must prove that he is no longer mentally ill or dangerous.

(2) The finding that petitioner was not guilty by reason of insanity of attempted petit larceny establishes beyond a reasonable doubt that he committed the act constituting that offense. It also establishes by a preponderance of the evidence that he committed the act because he was mentally ill. Petitioner has argued that commitment on this basis is a denial of due process because this finding does not itself demonstrate the need for commitment by clear and convincing evidence. But even if proof of the commission of a criminal act can justify confinement, just as conviction would justify incarceration, and even if the finding of past mental illness can justify confinement in a hospital, rather than a jail, still, that confinement is a denial of the equal protection 5/ if it persists beyond the one year that those convicted of attempted petit larceny could be incarcerated.

Although there are several decisions of this Court that demonstrate that this is so, the case which is most directly on point is Baxstrom v. Herold, 383 U.S. 107 (1966), which the majority below all but ignores. 6/

In Baxstrom, the petitioner was convicted of assault and sentenced to 2-1/2 to 3 years in prison. While serving his term he was certified insane and transferred to a mental hospital under the jurisdiction of the New York State Department of Corrections. Like appellant here, Baxstrom did not challenge his initial commitment to the hospital. He argued, however, that he could not be kept in the hospital beyond the term to which he had been sentenced unless he was, at the expiration of his term, found committable by a jury just as a putative civil committee would

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5/ The right to equal protection of the laws is guaranteed under the Fifth Amendment's due process clause. Bolling v. Sharpe, 347 U.S. 497 (1954).

6/ There are decisions from the United States Court of Appeals which are controlling on that court and which are directly contrary to the holding of the District of Columbia Court of Appeals in this case. See Waite v. Jacobs, supra, and United States v. Brown, supra.

have to be so found under New York's civil commitment statute. He argued that the New York statute authorizing his continued confinement upon a finding by a judge without jury review denied him equal protection of the laws. The Supreme Court agreed and struck down the statute as unconstitutional.

Baxstrom was found guilty of a violent crime. The appellant here was not even accused of a violent crime. Baxstrom was certified by a psychiatrist to be presently insane at the time he was initially committed to the mental hospital. The appellant's initial commitment here was automatic; he was not found by a judge or jury -- or even certified by a psychiatrist -- to be presently mentally ill either at the time of his initial commitment or at any time since.7/ Baxstrom's confinement beyond his sentence was authorized only upon a finding by a judge that the state had demonstrated by a preponderance of the evidence that he was in need of care and treatment -- the same standard as applied in New York to putative civil committees. Appellant here has never been found presently mentally ill and dangerous -- the civil commitment standard in the District -- by a judge or jury. Yet, on the theory of the court below, the appellant here, unlike Baxstrom, can be detained indefinitely without the state ever having to prove mental illness or dangerousness. This is clearly contrary to the teaching of Baxstrom.

7/ It is true that at a hearing in March, 1976, a clinical psychologist testified that she felt that the appellant was mentally ill. This hearing was, of course, in no way equivalent to a civil commitment hearing. Moreover, on the government's theory the judge could have ordered the appellant's continued confinement merely on the basis of a presumption of "continuing" mental illness and dangerousness with no supporting testimony or evidence whatever. The "presumption" is untenable for the reasons appellant has explained, i.e., its major premise -- that the appellant was found to be mentally ill and dangerous to begin with -- is simply false.

The court below sought to justify its holding by minimizing the differences between the procedural protections accorded a putative civil committee under 21 D.C. Code 545, and those provided a defendant found not guilty by reason of insanity under 24 D.C. Code 301. In fact, these differences are crucial; for, quite simply, under 21 D.C. Code 545 the state must prove that the individual it seeks to confine is committable, while under 24 D.C. Code 301, the individual is automatically confined unless and until he can prove that he is not committable. As this Court recognized in Addington, the burden of proof where a psychiatric diagnosis is involved is inherently difficult to meet, whoever bears it. Thus, as the United States Court of Appeals put it in Waite v. Jacobs, supra, "in cases [involving] psychiatric testimony, which is 'often unclear, sometimes woefully muddled' . . . the allocation of burden of proof can be outcome determinative."8/

Moreover, the differences in the procedural protections at issue here, are far greater than those which this Court held in Baxstrom resulted in a denial of equal protection.

Baxstrom's confinement beyond the term of the original sentence required the state to prove the need for such continued confinement. In fact the only difference between the procedure which New York provided for those whose commitment the state sought to extend beyond their prison sentences and those whom it sought to commit civilly initially was the availability to the latter of a de novo jury trial on sanity. Since under the court of appeals' reading of 24 D.C. Code § 301 the commitment is automatic and no hearing at which the government must prove anything is ever required, the denial of equal protection here is an a fortiori case.

8/ Indeed, it seems to have been so here; for when the panel below ordered the government either to seek the petitioner's civil commitment or to release him, the government released him, apparently because it felt it could not prove him committable. But at the same time, petitioner has consistently been unable to prove that he should be released. Petitioner is currently committed on the basis of his original commitment under 24 D.C. Code 301(d), so the case is not moot.

The court of appeals simply failed to come to grips with this Court's decision in Baxstrom. The only differences between that case and this all point in the petitioner's favor, for surely he cannot, consistent with equal protection, be treated more harshly upon his acquittal than Baxstrom, and those like him, can be treated upon conviction. And although the dissent convincingly demonstrates that 24 D. C. Code 301(d) has a partially punitive purpose, 9/ even if it did not, it unquestionably results in a denial of equal protection by treating insanity acquittees more harshly in terms of duration of confinement than defendants convicted of the same criminal offense and without the procedural safeguards accorded to putative civil committees. Petitioner cannot, in other words, be denied the protections accorded both a convicted criminal and a putative civil committee simply because he successfully raises an insanity defense. Yet Mr. Jones has now been involuntarily confined for nearly six years for trying to steal a coat even though the state has never proved that he is in need of such confinement. This treatment constitutes a denial of both due process and equal protection.

9/ 24 D.C. Code 301(d) also irrationally penalizes those defendants who choose to raise an insanity defense (and prevail), for the sections automatic commitment procedure does not apply where the insanity defense is imposed by the court. Yet the state's interest in committing the insanity acquittee, whether the defense is raised or imposed, is of course identical.

CONCLUSION

For these reasons the writ of certiorari should issue to review the judgment and opinion of the District of Columbia Court of Appeals.

Respectfully submitted,

WILLIAM J. MERTENS

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PETITION FOR A WRIT OF CERTIORARI TO THE
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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Michael Jones, respectfully moves pursuant to Rules of this Court for leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. As grounds for this request, petitioner asserts:

1. Petitioner is filing this 6th day of August, 1981, a petition for writ of certiorari to review the judgment and opinion of the District of Columbia Court of Appeals, which affirmed his commitment by the Superior Court of the District of Columbia.

2. Counsel was appointed to represent the petitioner in the Superior Court and in the Court of Appeals under the District of Columbia Criminal Justice Act, 11 D.C. Code §2601 et seq.

3. Because of his poverty, petitioner is unable to pay or the costs of this case and is unable to give security for the same.

4. The attached petition seeks review of the decision of the Court of Appeals that the Constitution permits committing petitioner indefinitely to St. Elizabeths Hospital on the strength of his acquittal by reason of insanity of a misdemeanor charge of attempted petit larceny, which would have carried a maximum jail term of one year had he been found guilty, even though the government never subsequently bore the burden of demonstrating that he was mentally ill or dangerous.

WHEREFORE, for these reasons, petitioner respectfully requests leave to proceed in forma pauperis.

Respectfully submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of Petitioners' Motion for Leave to Proceed in Forma Pauperis has been served by hand upon the Honorable Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530, and upon John A. Terry, Esquire, Chief, Appellate Division, U.S. Attorney's Office, this 6th day of August, 1981.

SILAS J. WASSERSTROM